United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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P06S

74-1678

IN THE

United States Court of Appeals

FOR THE THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

PHILIP ZANE, JEROME E. SILVERMAN, and ROBERT S. PERSKY,

Defendants-Appellants,

—and—

MORTON S. KAPLAN, CHARLES FISCHER, RAMON N. D'ONOFRIO, and U. S. SECRETARIAL INSTITUTE, LTD.,

Defendants.

On Appeal from a Denial of a Motion for a New Trial by the United States District Court for the Southern District of New York

REPLY BRIEF ON BEHALF OF APPELLANTS PHILIP ZANE AND JEROME E. SILVERMAN

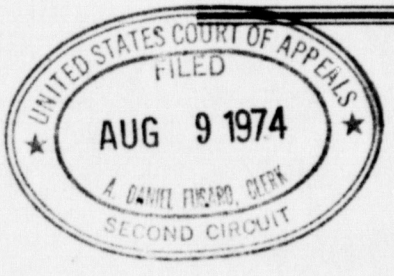

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TABLE OF CONTENTS

CASES CITED

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FOR THE SECOND CIRCUIT

- -x

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and ROBERT S. PERSKY, Docket No. 74-1678
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Defendants-Appellants, :

-and- :

MORTON S. KAPLAN, CHARLES FISCHER, :
RAMON N. D'ONOFRIO, and U. S. :
SECRETARIAL INSTITUTE, LTD., :

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- -x

REPLY BRIEF ON BEHALF OF APPELLANTS
ZANE AND SILVERMAN

This brief is respectfully submitted on behalf of appellants Jerome E. Silverman and Philip Zane in reply to the brief of the Government.

It is respectfully submitted that the Government's brief misconceives the standard for consideration of a motion for new trial based upon newly discovered evidence, and that

under the applicable standard--indeed, even under the standard suggested by the Government*--the newly discovered evidence in the instant case clearly requires the granting of a new trial to appellants Zane and Silverman.

> "[T]he defendant would be entitled to a new trial upon showing that there was a significant possibility that a new trial . . . would produce a different result." United States v. Soles, 482 F.2d 105, 107-108 (2d Cir. 1973), cert. denied 414 U.S. 1027 (1973) (emphasis added).

This Court has most recently restated this standard, in somewhat different language which conveys the same meaning, in United States v. Gugliaro, Docket No. 1089, decided July 19, 1974, where this Court, in affirming the District Court's denial of a motion for a new trial based on newly discovered evidence, held,

> "We see no 'reasonable likelihood' that this [newly discovered evidence] could have influenced the verdict." (Slip Op. at 4886).

Indeed, it is respectfully submitted that an even less onerous standard should apply in this case. Where newly discovered evidence indicates that a Government witness has committed perjury during the defendant's trial--and the

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* The District Court did not state the standard upon which its ruling was based (A1-A3).

Government concedes in its brief that evidence of Yamada's most recent offenses "would contradict the impression he gave at the trial that he had abandoned his life of crime and had reformed" and "the impression that Yamada gave at trial about his rehabilitation turned out to be inaccurate" (see Government Brief, pp. 4, 6)--the applicable criterion is whether the new evidence, if presented to the jury, might have produced a different result. As this Court held in United States v. Polisi, 416 F.2d 573, 577 (2d Cir. 1969):

> "Where the conviction is shown to be based even in part upon perjured testimony, however, a court will not stop to inquire as to the precise effect of the perjury, but will order a new trial if without the perjury the jury might not have convicted. Mesarosh v. United States, 352 U.S. 1, 77 S.Ct. 1, 1 L.Ed.2d 1 (1956); Larrison v. United States, 24 F.2d 82 (7 Cir. 1928)."

It is respectfully submitted that the District Court's finding and the Government's argument that evidence of Yamada's recent convictions would be merely "cumulative" to evidence adduced at trial of Yamada's other crimes completely overlooks the true significance of Yamada's recent convictions: they conclusively prove that he was not the reformed and honest man that the Government pictured him as being at the time he testified at trial, now willing to tell

the truth after he had made his deal with the Government and ready to suffer the appropriate punishment for his previous crimes. Rather, he was a desperate man still willing if not eager to make false statements to a Federal Court in the misguided notion that this would help his own cause. Yamada's new convictions are not "cumulative" to the evidence of his other crimes because all evidence of Yamada's other crimes adduced at trial related exclusively to the period of time before Yamada's purported reformation; there was not a shred of evidence--and the Government's brief cites none--that Yamada had committed any crimes or wrongdoings, or had made any misstatements of any nature whatsoever, after his "reformation". This is not a situation where Yamada has suddenly been discovered to have committed other securities frauds, in addition to those which he admitted to at trial, at or about the same time as his commission of those other offenses; rather, Yamada's new convictions are the only evidence of any crimes committed by the "new" Yamada. The "new" Yamada was not impeached at trial by any evidence of any criminal activity or by any evidence of any false statements made subsequent to his "reformation".

Indeed, the Government conceded as much in its

sentencing memorandum before Judge Lasker, where the Government stated:

> "The fraud perpetrated by Yamada has substantially vitiated his usefulness as a Government witness in any future prosecutions" (A61).

The Government repeats this in its brief (at p. 6, fn.), where the Government states that Yamada's most recent convictions "naturally reduce his usefulness as a witness for the Government since it provides additional new impeaching evidence." If Yamada's recent convictions are merely cumulative to his other convictions, his effectiveness as a Government witness would not be significantly hampered. It is simply unrealistic to deny that there is a "significant possibility" or a "reasonable likelihood" that one or more jurors, who may very well have accepted Yamada's testimony notwithstanding his past crimes because of his purported reformation, would not have given Yamada's testimony such credence if it had been learned that Yamada's "reformation" was a lie.

In this regard, the Government now is attempting to make itself, rather than the jury, the trier of facts. The Government's brief states (at p. 4) that the false impression Yamada gave at trial of being a man who had renounced crime and had reformed was "an impression that doubtless

accurately reflected his state of mind at the time [that he testified]." There is absolutely no factual support for this assertion in view of Yamada's new convictions. The fact of the matter is that the evidence of Yamada's "state of mind" at the time he testified--which was obviously crucial to the jury's evaluation of his credibility--was entirely inadequate when viewed in the light of the new developments. What the Government must mean by Yamada's "state of mind" is the extent to which Yamada would lie in order to (as he then viewed the situation) reduce his own punishment. No piece of or combination of evidence or testimony adduced at trial bore more directly or more strongly on this issue than the new evidence of Yamada's crimes before Judge Cooper. Indeed, the Government fails to refer this Court to a single word of any such evidence. The facts relevant to Yamada's state of mind while testifying were crucial to an evaluation of his credibility (cf. Davis v. Alaska, ___ U.S. ___ (1974)), and his new convictions furnish the only directly probative evidence in that regard.

The Government's brief (at pp. 4, 6) also suggests that the evidence of Yamada's new crimes would be "merely impeaching" of Yamada's credibility and "in no way related to the factual issue [of appellants' guilt or innocence]

before the jury." However, although obviously the ultimate issue before the jury was appellants' guilt or innocence, the direct issue upon which such a determination would be made by the jury was their evaluation of whether or not the Government's witnesses--most importantly Yamada and Galanis--were telling the truth. Yamada's most recent crimes against the Court are intimately connected with the overriding issue of his motivation to lie at appellants' trial. The jury was confronted with the issue of the extent to which Yamada would lie in order to reduce his own punishment. Yamada's newest crimes establish unquestionably, and to an extent previously unavailable, Yamada's desperation and the resulting depths to which he would stoop in order to attempt to save himself. As we now know, but as the jury never learned, Yamada was quite willing to construct an outrageous and elaborate web of lies and to present those lies to a Federal Court.

The Government also attempts to minimize the importance of Yamada's testimony to the Government's case against Zane and Silverman. This argument is undercut not only by the Government's own statement in its brief on the original appeal of appellants' convictions (at p. 3 thereof)

where the Government introduced its "statement of facts" by stating "the principal witnesses for the Government were John Peter Galanis and Akiyoshi Yamada", but by the more significant fact that Judge Wyatt, even in denying appellants' motion for a new trial, made no such finding, even though the Government pressed the same argument in the District Court (see pp. 23 and 24 of transcript of proceedings of April 26, 1974). It is difficult to perceive how Yamada's testimony, covering 416 transcript pages over more than two complete trial days, could possibly be deemed only to have been "of secondary value" (as claimed in the Government's brief, p. 7). Included among Yamada's many statements during his testimony at trial were the following:

> Yamada testified that he allegedly had a telephone conversation with Morton Kaplan "in late April to early May. And the conversation basically centered around the fact that Mr. Kaplan felt that Arthur Andersen wouldn't be as friendly toward him as he would like . . . . At this point in time Arthur Andersen wasn't about to certify the financial statements of Microthermal." (T.Tr. 1553*). Yamada further testified that Arthur Andersen's reluctance to certify the Microthermal financial statement had arisen only after Arthur Andersen "had begun some work" on the audit (T.Tr. 1746).

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* "T.Tr." followed by a number designates page reference to the trial transcript.

"Mr. Galanis said to me that in his conversations with Mr. Zane and Silverman that they would be willing to certify the Microthermal Applications annual financial statement if, in fact, we could obtain a letter from a bank saying that the certificates of deposit in the sum of $480,000 existed, and that they would not physically look at the certificates." (T.Tr. 1562-1563).

"Mr. Galanis told me that he got in touch with Steven Burns . . . and outlined the essential problem to Mr. Burns, the fact that $480,000 was not there, that because of the time element, the financial statement of Microthermal Applications had to be audited, that Arthur Andersen was not going to audit it; and that we find an accountant that would be more cooperative." (T.Tr. 1554). (The Government's suggestion in its brief at p. 7, fn., that Yamada's testimony in this respect merely corroborated Burns' is inaccurate; Yamada's testimony with respect to Burns' knowledge as of the time Burns initially contacted Zane and Silverman was far more damaging to Zane and Silverman than Burns' own testimony, as Burns himself testified that as of the time he contacted appellants he (Burns) did not know of any problem with the prospective audit to be performed, and was unaware of the non-existence of the "CDs". (T.Tr. 1880)).

"Mr. Galanis told me that Mr. Burns was going to provide accountants . . . . [H]e said these accountants had worked before with Mr. Burns, and Mr. Burns had them in his hip pocket; that it would cost us money, but that they would be more than cooperative." (T.Tr. 1560)

Yamada testified that Zane and Silverman were present at the alleged "Rozzo meeting", at which the non-existence of the certificates was allegedly discussed. (T.Tr. 1563)

Every one of these statements bore directly on Count 2, the only count of a total of thirteen charged upon which Zane and Silverman were convicted--a circumstance which the Government's brief apparently deems unworthy of mention. The mere fact (referred to in the Government's brief at p. 7, fn.) that some of the above testimony reports alleged statements made by others who testified at trial hardly detracts from the significance of Yamada's testimony, as his corroboration of those others' testimony may very well have been what persuaded the jury to accept at least enough of that testimony to convict Zane and Silverman on Count 2. There is certainly a strong possibility that Yamada's testimony was considered by the jury as corroborative of the testimony of the Government's other witnesses, and that the jury therefore accepted the testimony of those other witnesses because of Yamada's testimony.

> "Only the jury can determine what it would do on a different body of evidence, and the jury can no longer act in this case." Mesarosh v. United States, 352 U.S. 1, 12 (1956).

Furthermore, having before it an unmistakable example of the desperate lengths to which Yamada would commit perjury in order to obtain leniency, there would also be a significant possibility that the jury would consider Yamada's wilful

false statements to Judge Cooper in evaluating the credibility of the other Government witnesses who had agreed to "cooperate" with and testify for the Government in exchange for leniency.

It is respectfully submitted that the jury's verdict as to Zane and Silverman is most significant in this regard. The very fact that the jury convicted Zane and Silverman on only one count each of the total of thirteen counts charged against them indicates persuasively that the Government's evidence against Zane and Silverman in this case was not strong, and that the newly discovered evidence as to Yamada might very well have been enough to swing the balance in favor of acquittal.

The Government's brief, in short, erroneously attempts to minimize the enormous impact that the evidence of Yamada's recent convictions would have on an assessment of his credibility by an impartial jury.* The Government's

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* The effect that this newly discovered evidence would have on a jury's consideration of Yamada's credibility should also be considered in the light of this Court's holding on appellants' original appeal that the Court below did err in limiting appellants' cross-examination of Yamada (495 F.2d 683, 696). Although this Court held that the

(cont'd. on next page)

comparison (at Government Brief, p. 5) of the circumstances surrounding Yamada's crimes to a situation such as that in United States v. Brewster, 231 F.2d 213 (2d Cir. 1956)--where this Court held that a Government witness' false denial of a conviction for stealing a pair of shoes 36 years before testifying at the defendant's trial was not sufficient to warrant the granting of a new trial--is simply ludicrous The unusual extent of the Government's efforts in recommending severity in Yamada's sentencing on his newest convictions reflects the grossness of Yamada's crimes far more realistically than does the Government's present attempt to sustain a conviction by trying to pass off Yamada's newest crimes as being merely "some additional ammunition for cross-examination" (see Government Brief, p. 6).

A comparison of the instant case to the other cases upon which the Government primarily relies illustrates the uniquely compelling factual situation presented by this case,

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error was harmless, it is respectfully submitted that the combination of the limitations on appellants' cross-examination of Yamada plus the evidence of Yamada's most recent crimes could certainly be expected to exert a significant impact upon a jury's appraisal of Yamada's credibility.

and the reasons why a new trial is clearly required. The Government appears to rely particularly on United States v. Sposato, 446 F.2d 779 (2d Cir. 1971), and United States v. Aguillar, 387 F.2d 625 (2d Cir. 1967). In both Sposato and Aguillar, a Government witness had been charged with a crime subsequent to testifying at trial, but in neither case had the witness been convicted. Thus, in Aguillar, the Court held that

> "The charge against Spratley [the Government's witness] alone, without a conviction, could not even have been used to impeach him." (387 F.2d at 626),

and in Sposato the Court held that

> "It is not disputed that the charges against Peden [the Government's witness] have not resulted in any convictions, and appellant offers no reason why the general rule of inadmissibility [of charges not resulting in convictions] should not apply to his case." (446 F.2d at 781)

In the instant case, however, Yamada was not simply charged with but pleaded guilty to six serious offenses, the making of and conspiracy to make different material false statements to a Judge of a United States District Court.

Moreover, in both Aguillar and Sposato, the alleged offenses, even if they could have been assumed to generally

discredit the Government's witness, were not related to the witness' testimony in the Government's case. Thus, in Aguillar the witness' subsequent counterfeiting offense, even if committed by him, was totally unrelated to his testimony at the defendant's trial, and in Sposato, the witness' subsequent charge of conspiracy to commit bribery, even if committed by the witness, was also unrelated to the witness' testimony at the defendant's trial. In the instant case, however, there is a direct and unquestionably close relationship between Yamada's subsequent offense and his testimony at the trial of Zane and Silverman. The extent to which Yamada was willing to commit perjury in order to reduce his own punishment was the crux of the factual issue presented to the jury with respect to Yamada's testimony. He was portrayed by the Government and by himself as a man who had turned over a new leaf and who, despite his previous crimes, was now reformed and worthy of the jury's belief. As the Government acknowledges in its brief (at p. 6), "according to his testimony at [appellants'] trial, he turned over a new leaf." His motive to lie in order to help himself by making a bargain with the prosecution was described at trial by the prosecutor to the jury as "a tremendous amount of wind and air" (T.Tr. 57). Only his most recent convictions convey the true extent of

Yamada's motivation to lie, and the fact that Yamada would readily succumb to this motivation.

In brief, the difference between this case and the cases such as Sposato and Aguillar are threefold:

1. Here, Yamada has been adjudged guilty of six felonies, whereas the Government's witnesses in Sposato and Aguillar were not adjudged guilty of any offense but had merely been charged;

2. Here, Yamada's crimes bore directly on the crucial issue presented by his testimony at trial--i.e., the extent to which he would lie in order to obtain leniency and the extent to which he had turned over a new leaf and was now a reformed man worthy of belief--whereas in Aguillar and Sposato the crimes charged against the witnesses were unrelated to the witness' testimony at trial;

3. Here, Yamada's crimes were direct instances of material false statements wilfully made to a Judge of this Court, whereas in Sposato and Aguillar the offenses charged against the witnesses were offenses which did not bear as directly on the witness' veracity, and there was therefore a serious question as to whether those convictions would have been admissible under the

standards enunciated in United States v. Palumbo, 401 F.2d 270 (2d Cir. 1968).

Indeed, even Judge Wyatt, in denying the motion for a new trial, agreed with appellants that the instant case presented facts significantly distinguishable from the facts of Sposato and Aguillar, upon which the Government also relied in the District Court (see transcript of proceedings of April 26, 1974, at p. 20).

It is respectfully submitted that this case is indistinguishable from Mesarosh v. United States, 352 U.S. 1 (1956), which is discussed in appellants' main brief at pp. 11-23. The sole distinction which the Government's brief attempts to suggest between this case and Mesarosh is that

> "in Mesarosh . . . Mazzei's [the Government's witness] subsequent false testimony regarding alleged Communist activities paralleled his substantive prior testimony about the same subject matter in Mesarosh, testimony that went directly to the purported guilt of the Mesarosh defendants. On the other hand, Yamada's conviction for submitting fictitious letters to Judge Cooper is in no way 'material to the factual issues at the trial' in this case." (Government Brief, p. 8).

However, Yamada's conviction for submitting false letters to Judge Cooper is plainly relevant not only to his general credibility, but to an impartial assessment of his false

"reformation" and of the tremendous degree to which Yamada would lie in order to try to help his own position. In both Yamada's trial testimony and his false letters to Judge Cooper, Yamada was attempting to obtain leniency for himself and was further attempting to persuade the Court that Yamada was an upright man worthy of the Court's consideration and belief. At the time that he wilfully submitted the fraudulent letters to Judge Cooper and conspired to do so, Yamada was an unreformed man so desperate for leniency that he would and indeed did concoct a total series of lies, and presented them to a Federal Court to attempt to help himself. This was precisely what was argued to the jury on behalf of Zane and Silverman at their trial, and was disputed by the prosecution. Under these circumstances, it is difficult to imagine how Yamada's statements to Judge Cooper can be deemed unrelated to his testimony at appellants' trial.

It is respectfully submitted that the Government, in attempting to circumscribe narrowly the holding of Mesarosh, has misconstrued the basic meaning of that decision and is attempting to construct an artificial distinction. As Judge Moore has stated, "Mesarosh . . . holds that when the credibility of a principal Government witness has been wholly

discredited on the basis of representations by the Government itself, a new trial must be ordered." United States v. Polisi, supra at 581-582 (Moore, J. dissenting). Clearly, Yamada's credibility has been wholly discredited, on the basis of representations made by the Government itself.

It is also of significance that in Mesarosh the Solicitor General stated his position that "the testimony given by Mazzei [the Government's witness] at the trial [in this case] was entirely truthful and credible" (352 U.S. at 4), whereas there has been no such statement from the United States Attorney in this case in either the District Court or this Court. It is quite understandable that even the prosecution would be most reluctant under these circumstances to vouch for the credibility of someone who by his own admissions has committed a series of deliberate lies of outrageous magnitude.

CONCLUSION

For the above reasons, and for the reasons set forth in appellants' main brief, it is respectfully submitted that the judgments of conviction against appellants Zane and Silverman on Count 2 should be reversed, and a new trial on Count 2 should be ordered.

Respectfully submitted,

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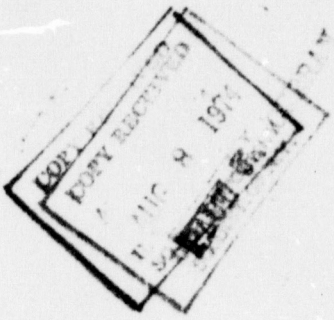
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